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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 1284

RUSSEL JAMES GAUDET,
Petitioner,

v.

EXXON CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

EXXON CORPORATION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 4, 1977, rehearing denied December 14, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Louisiana in the case of Russel James Gaudet, petitioner herein, was not printed but appears at page 1a of Appendix A to this petition.[1] The

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[1] All page citations to the Appendices to this petition are hereinafter preceded by the designation "A".

opinions of the same court in the related Ruven St. Pierre cases were also not printed but appear as Appendix B to this petition (A 4a).

The opinion and judgment of the Fifth Circuit Court of Appeals combining the Gaudet and St. Pierre cases and affirming the decisions of the District Court were rendered on November 4, 1977, are printed at 562 F.2d 351 (5th Cir. 1977), and are reprinted herein as Appendix C (A 9a). A petition for rehearing was denied by the Fifth Circuit in the Gaudet case on December 14, 1977, and is printed herein as Appendix D (A 24a). A petition for rehearing en banc in both the St. Pierre cases was denied on December 19, 1977, and is printed herein as Appendix E (A 25a).

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered November 4, 1977. A timely petition for rehearing in the Gaudet case was denied December 14, 1977. This petition for a writ of certiorari is being filed within 90 days of December 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the statutory provisions involved appear as Appendix F (A 27a) to this petition.

QUESTIONS PRESENTED

The Outer Continental Shelf Lands Act (Lands Act), under which this suit was brought, provides that adjacent state law shall control in suits under the Act except to the extent that such state law directly conflicts with applicable federal law. The Lands Act makes applicable the compensation provisions of the Longshoremen's and

Harbor Workers' Compensation Act (LHWCA) in certain circumstances. Here, LHWCA was asserted by respondent (Exxon) to defeat a suit for negligence brought by an employee (petitioner) of another company (Tidelands) on the theory that petitioner was a "borrowed servant" and thus an employee of Exxon. Summary judgment was granted in favor of Exxon and against petitioner. The questions presented are:

1. When a suit is brought for negligence under the federal Lands Act, and LHWCA is asserted as a defense, is the issue as to whether the suing employee is a "borrowed servant" and thus entitled only to LHWCA compensation an issue to be determined by interpretation of the Lands Act (with state law thus made applicable) or by interpretation of LHWCA?

2. Whether or not federal law applies in a suit under the Lands Act, is the status of "borrowed servant" one to be determined as a matter of law, and thus taken from the jury, or is it a question of fact to be submitted, where there is a disputed pre-trial record, to a jury at trial?

3. What factors determine whether an employee is a borrowed servant under the Lands Act so as to defeat a suit for common law negligence, and is the weight and inferences to be accorded each of such factors a matter for jury consideration or a matter for judicial determination by way of summary judgment?

4. Is it proper for a federal court to grant summary judgment in favor of a party (Exxon) claiming the existence of a borrowed servant relationship under the Lands Act to defeat a suit for common law negligence where such facts as the following are present:

(a) A contract between Exxon and Tidelands, petitioner's regular employer, provided that petitioner's work was to be under the control of Tidelands and that Tide-

lands was to be an independent contractor as to all such work performed;

(b) Exxon conceded in answers and admissions that petitioner was employed by Tidelands, that Exxon exercised no supervision on control over him, and that on the day of the accident no Exxon employees were on the platform where the accident occurred;

(c) Tideland's insurer paid LHWCA compensation benefits to petitioner as an employee of Tidelands; Tidelands filed an accident report with the Department of Labor as petitioner's employer; and Exxon filed no such report as required by LHWCA;

(d) Petitioner swore that he had to report regularly about his work to Tidelands, which supplied some of his hand tools, and he submitted time records each day to Tidelands;

(e) Petitioner swore that he performed some of his work without any supervision from anyone, that he followed safety regulations prescribed by Tidelands, and that he regularly received certain instructions from Tidelands; and

(f) Petitioner depended entirely upon Tidelands for promotions, and he could be fired only by Tidelands.

STATEMENT OF THE CASE

This case arises out of personal injuries sustained by petitioner Gaudet while performing general maintenance and repair work on a production platform owned by respondent Exxon Corporation. Exxon's platform rests upon the Outer Continental Shelf approximateiy 29 miles seaward of Grand Isle, Louisiana. The accident occurred when a barrel of chemicals fell from a rack, striking and injuring Gaudet.

At the time of the accident, Gaudet was working on the Exxon platform pursuant to a contract between Tidelands Marine Service, Inc., and Exxon. Gaudet was an employee ("Production Foreman 1st") of Tidelands (CA 140)[2] and for many years had regularly been assigned stints of duty on various Exxon platforms.

The Exxon/Tidelands contract (CA 134, 135) specifically established that workers assigned to Tidelands for work on Exxon's production platforms were to be considered *independent contractors*:

> III. It is understood and agreed that all work so done by Contractor [Tidelands] shall meet with the approval of Humble's [Exxon's] representatives, but that *the detailed manner and method of doing the work shall be under the control of Contractor*, Humble being interested only in the result obtained and that *Contractor is an independent Contractor as to all work performed hereunder.* [Emphasis added.[3]]

Following his injury, Gaudet filed a claim against his employer, Tidelands, under LHWCA, 33 U.S.C. § 904, and he is currently receiving benefits under this Act (CA 133). Tidelands filed an accident report with the Department of Labor as Gaudet's employer (CA 140), whereas Exxon filed no such report, as it would have

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[2] "CA" refers to the Appendix filed in the Fifth Circuit Court of Appeals.

[3] The contract also provided Exxon with the benefit of Tideland's insurance coverage in the event that one of Tideland's employees filed a claim against Exxon on the theory of being Exxon's employee through application of the borrowed servant doctrine. This subsection reads:

> 10. Endorsement that a claim made against Humble [Exxon] and/or its underwriters by an employee of assured Employer [Tidelands] hereunder based on the "doctrine of borrowed servant" shall, for purposes of this insurance, be treated as a claim arising under this policy against the assured-Employer and Humble shall receive the benefit of this insurance.

been required to do under LHWCA if it had been Gaudet's employer. 33 U.S.C. § 930.

Gaudet also filed suit in the United States District Court for the Western District of Louisiana under the Lands Act, 43 U.S.C. § 1333(b), for Exxon's negligence proscribed by the common law of the State of Louisiana. The reason for bringing this action was to obtain full recompense for all of the damages suffered because of Gaudet's injury negligently caused by Exxon.

Exxon conceded in answers and admissions that Gaudet was employed by Tidelands and that Exxon exercised no supervision or control over him (CA 5, 30, 35, 37). Moreover, on the date of the accident no Exxon employees were even on the tower where the accident occurred (CA 31). Nevertheless, Exxon filed a motion for summary judgment, claiming that Gaudet was its "borrowed servant", or employee, and thus Gaudet's exclusive claim was for compensation in accordance with LHWCA.

In an affidavit and other materials filed in opposition to Exxon's motion, the following facts, among others, appeared: Gaudet swore that he had to report regularly about his work to Tidelands, and he submitted time records each day to Tidelands (CA 136-138); he swore that he performed his work without supervision from any Exxon people (CA 137), that he followed safety regulations prescribed by Tidelands, and that he regularly received instructions from Tidelands (CA 136-138); Tidelands furnished some of Gaudet's hand tools (CA 134; A 3a); Gaudet depended entirely upon Tidelands for promotions, and he could be fired only by Tidelands (CA 136-138).

Despite these facts, the District Court found on the basis of other affidavits and depositions that Gaudet's "day-to-day work activity was under Exxon's control," that there were "no issues of material fact in dispute,"

that Gaudet was Exxon's "borrowed employee," and that therefore Gaudet's "exclusive remedy" was under LHWCA (A 3a). The District Court granted summary judgment to Exxon (*id.*).

The Fifth Circuit Court of Appeals combined the Gaudet case with a pair of similar cases involving one Ruven St. Pierre, who had also performed work for Exxon but who had been regularly employed by Bourne's Welding Service, Inc. The court affirmed the granting of summary judgment in all cases.[4] In doing so, it held, *inter alia*, that "[c]onsidering this as best viewed as a question of the extent of coverage under the LHWCA, federal law applies" (A 17a), and "the issue of whether a relationship of borrowed servant existed is a matter of law" (A 18a).

REASONS FOR GRANTING CERTIORARI

1. The Fifth Circuit Violated This Court's Rulings by Determining Petitioner's Rights and Status Under LHWCA, and Applied Federal Law, Rather Than Under the Lands Act, Which Would Have Made State Law Applicable.

In order that the Court may understand precisely what the Fifth Circuit has ruled in this case, certain salient facts must be made clear. This suit was brought *not* under LHWCA but rather under the *Lands Act*, since the accident occurred on a fixed platform located on the outer continental shelf off the shore of Louisiana. LHWCA entered the case only as a *defense* asserted by Exxon. LHWCA is not applicable at all if the petitioner, Gaudet, was Tideland's employee; it becomes applicable only if a court *first* determines that Gaudet—despite all the facts he submitted proving otherwise—was an em-

[4] A petition for a writ of certiorari is contemporaneously being filed in this Court by St. Pierre.

ployee of Exxon by virtue of the "borrowed servant" doctrine. If Gaudet was not a borrowed servant under the Lands Act, LHWCA never comes into play in this case (see A 28a).

It is clear, however, that the Fifth Circuit did not determine the borrowed servant doctrine by interpreting the Lands Act, as it should have, but rather it viewed the issue as one under LHWCA.[5] This was serious error, for if the court had correctly looked to the Lands Act, it would have found that "borrowed servant" is not referred to or defined,[6] so that the court's duty was to seek from *Louisiana* law the proper criteria for establishing whether a borrowed servant relationship existed.

That this was its duty has been made clear on several occasions by this Court. *E.g., Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). As the Court explained in *Chevron Oil*:

> The policies underlying the federal absorption of state law in the Lands Act make this result [adoption of state law] particularly obvious. As we pointed out in Rodrigue, Congress recognized that " 'the Federal Code was never designed to be a complete body of law in and of itself' " and thus that a comprehensive body of state law was needed. . . . Congress also recognized that the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute" favored application of state law with which these men and their attorneys would be familiar. . . .
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> But, under the Lands Act, there is not even such limited freedom to create a federal statute of limitations, for Congress specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law. *Congress specifically rejected national uniformity* and specifically provided for the application of state remedies which demand state, not federal, statutes of limitation. *Thus, Congress made clear provision for filling in the "gaps" in federal law; it did not intend that federal courts fill in those "gaps" themselves by creating new federal common law.* [404 U.S. at 103-105; emphasis added.[7]]

Despite this admonition, the Fifth Circuit not only interpreted the wrong Act but specifically held that the borrowed servant issue was one of federal law (A 17a, 18a).

If the court below had looked to state law, as it should have done, the result in this case would have been exactly opposite from the one actually reached. This is true for two reasons: (a) Louisiana uses different criteria from those applied by the Fifth Circuit in determining whether an employee is a borrowed servant, and (b) Louisiana treats the issue as a factual one for jury determination rather than either a legal one or one suitable for summary judgment.

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[5] *E.g.*, "Thus in the instant case the question is whether the circumstances of appellants' [Gaudet's] employment are such that Exxon should be considered an employer and not a third party *under the LHWCA* . . ."; [we consider] this as best viewed as a question of the extent of coverage *under the LHWCA*, . . ."; "[o]ther factors . . . may of course be helpful to the court in evaluating *whether the LHWCA should apply* . . ." (A 17a; emphasis added throughout).

[6] The Act defines the terms "employees" and "employer" when and if LHWCA becomes applicable, but even then provides no guidance as to an independent contractor or borrowed servant relationship. 43 U.S.C. § 1333(c) (A 28a, 29a).

[7] Senator Cordon, in presenting the Lands Act to the Senate, specifically stated:

> Industrial accidents, accidental death, peace and order [present problems requiring a body of law for their solution, since] as every Member of the Senate knows, the Federal Code was never designed to be a complete body of law in and of itself, . . . [99 Cong. Rec. 6962-63.]

(a) The leading Louisiana Supreme Court decision, *Benoit* v. *Hunt Tool Co.*, 219 La. 380, 53 So. 2d 137 (1951), has been consistently cited and remains the governing law of the State.[8] The *Benoit* case held, among other things, that the general employer (here, Tidelands) is *presumed* to remain the employer, that proof of a division of control is insufficient to overcome that presumption, that the contract between the general employer and the second company (here, Exxon) is relevant to the nature of the relationship of the employee, that the right of the second company to discharge the employee—a right not present in the instant case—is a factor indicating a borrowed servant relationship, and that general orders to the employee by the second company simply indicate the work to be done and do not establish enough control to make the employee a borrowed servant.

The Fifth Circuit, on the other hand, placed its principal focus on the employee's working conditions and the duration of the agreement (A 17a). It did not take cognizance of any presumption one way or the other as to whether Gaudet remained Tidelands' employee, it overlooked facts clearly showing a division of control, it refused to apply contractual provisions making Gaudet an independent contractor, and it ignored Tidelands' sole right to discharge Gaudet.

(b) The state courts of Louisiana have consistently and repeatedly held that the issue of whether or not a

[8] *E.g., Berry Brothers General Contractors, Inc.* v. *Air Marine, Inc.*, 328 So. 2d 771, 774 (La. App. 1976); *Barrois* v. *Service Drayage Co., Inc.*, 250 So. 2d 135, 143 (La. App. 1971); *Universal Engineers & Builders, Inc.* v. *Lafayette Steel Erector Corp.*, 235 So. 2d 612, 615 (La. App. 1970); *Kezerle* v. *Hardware Mut. Cas. Co.*, 198 So. 2d 119, 123-125 (La. App. 1967); *Fontenot* v. *National Transfer Co., Inc.*, 99 So. 2d 795, 800-803 (La. App. 1957); *Stafford* v. *Gilmer*, 98 So. 2d 522, 526 (La. App. 1957).

borrowed servant relationship exists is one of *fact*, to be resolved by a jury.[9]

Thus, the important policy of the Lands Act enunciated by this Court in *Rodrigue* and *Chevron Oil*—the policy of applying nearby state law with which "men working on these artificial islands . . . and their attorneys would be familiar . . ."—has been totally destroyed by the Fifth Circuit in the instant case. The important point is not that the Fifth Circuit was in error—which it surely was—in this one case, but rather that an extremely dangerous precedent has been established in an area of ever-increasing importance.

While offshore activity to date has centered principally in the Gulf states, a resurgence of interest in locating and developing new sources of fossil fuel, including the leasing of blocks along the Eastern Seaboard, makes it certain that the Lands Act and its proper interpretation will become of increasing national significance and judical concern. In fact, one responsible report noted by Congress indicates that activity on offshore platforms will increase dramatically over the coming years.[10] Moreover, oil and gas field services annually rank among the most injury-prone in the economy. The

[9] *E.g., Barrois* v. *Service Drayage Co.*, 250 So. 2d 135 (La. App. 1971); *D'Antoni* v. *Sara Mayo Hospital*, 144 So. 2d 643 (La. App. 1962); *Grant* v. *Touro Infirmary*, 254 La. 204, 223 So. 2d 148 (1969); *Danks* v. *Maher*, 177 So. 2d 412 (La. App. 1965); *Leblanc* v. *Roy Young, Inc.*, 308 So. 2d 443 (La. App. 1975); *Nicholas Construction Corp.* v. *Spell*, 315 So. 2d 801 (La. App. 1975).

[10] Total annual investment costs for exploration wells and field development for domestic lease sales scheduled for 1977-1981 could amount to $357 million (1975 dollars) in 1978 and reach a peak of $2.1 billion per year from 1982 to 1985, assuming no delays in the proposed leasing schedule. Grigolumas, Dr. Thomas A., "Some Potential Implications of Domestic O.C.S. Lease Sales Scheduled for 1977-1981 for Businesses Located in the Gulf of Mexico," August 1977, contained as a part of a larger study by Prof. John R. Moroney "The Economic Impact of The Jackson/Murphy Amendments to The Outer Continental Shelf Act on the State of Louisiana," cited with approval at 124 Cong. Rec. H104, 105 (1978).

lost workdays due to injury incidence for oil and gas field services are approximately five times the rate of all other industries.[11] It thus becomes immediately imperative that the duties and responsibilities of those who operate offshore platforms toward those who work on them be properly established. If a company's employee assigned to intermittant work for another company cannot sue the second company for negligence and have a jury determine his status at the time of the accident, but instead is restricted to compensation benefits under LHWCA as a matter of law, with the underlying facts decided by a court without benefit of trial, that far-reaching result should be approved by this Court before its enters the fabric of federal law.

But we respectfully suggest that there should be no such approval. On the contrary, in the light of this Court's previous rulings, the decision below warrants summary reversal.

2. There is a Conflict Among the Circuits, and This Court Should Decide, As to Whether the Status of Borrowed Servant Under the Lands Act Is a Question of Law or Fact, and Which Criteria Should Be Applied to Determine That Status.

Even if petitioner is in error, and federal rather than state law somehow controls the determination of borrowed servant status in cases such as this one, we respectfully submit that two other errors of great import were made in the ruling below.

(a) As noted above, the Circuit Court held that whether a borrowed servant relationship exists is a matter of law rather than fact. It recognized that one of its own earlier rulings, *Guidry* v. *Texaco, Inc.*, 430 F.2d 781, 784 (5th Cir. 1970), had held to the contrary (A 18a n.8). It claimed, however, that its conclusion was supported by

[11] Bureau of Labor Statistics, "Occupational Injuries—Illnesses in the United States by Industry," Bulletin No. 1981 (1975).

another of its own decisions, *Ruiz* v. *Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and by rulings of the Seventh and Ninth Circuits. *Gudgel* v. *Southern Shippers, Inc.*, 387 F.2d 723 (7th Cir. 1967); *McCollum* v. *Smith*, 339 F.2d 348 (9th Cir. 1964) (A 18a).

Actually, *Ruiz* was replete with indications that this issue could *not* be one of law. It said, for example, that no one of nine listed factors, or any combination of them, is decisive, and "no fixed test is used to determine the existence of a borrowed servant relationship" (413 F.2d at 312-313)—a concept completely at variance with the idea that the issue of borrowed servant status is determined by a fixed rule of law. In *Gudgel*, the Seventh Circuit in a case involving neither the Lands Act nor LHWCA recognized the borrowed servant issue as one of fact and allowed a jury, under state law, to consider it. And in *McCollum*, the Ninth Circuit again applied state law and held that when the facts are debatable, the issue is one of fact for the jury to decide.

Thus, a conflict exists not only as recognized by the court below but between the ruling here and two other Circuits in the very decisions cited by the Fifth Circuit in support of its position. The point is an extremely important one, for if the issue is truly one of law, it can easily be decided by the summary judgment route, as it was in this case, whereas if the issue is one of fact, and the record stands as this one does, the injured employee should have a jury decide whether the borrowing company was negligent and owes him damages.

(b) There is a serious question as to which criteria should be applied to resolve the borrowed servant relationship issue.

The District Court below adopted the "primary" criteria of "whose work was being performed" and "who had control over the work activities of the employee"—

without indicating which other criteria were secondarily relevant (A 2a). It then found on the basis of affidavits and depositions that "Tidelands had no interest in the operation," Gaudet "took all of his directions from Exxon foreman", "the day to day work activity was under Exxon's control", and Gaudet "or Tidelands furnished some of the hand tools" (A 2a, 3a). It granted summary judgment on the basis of these criteria and findings (*id.*).

The Court of Appeals took a slightly different tact, saying that "the principal focus" should be on whether Exxon was responsible for Gaudet's working conditions and the duration of the arrangement (A 17a)—again without setting forth what additional factors were pertinent to the inquiry, and without citing any authority to support its conclusion. The court then held that "[t]he trial court found that sufficient 'determinative factual ingredients' . . . were undisputed" to warrant summary judgment (A 19a). The Court of Appeals placed particular emphasis upon its assumption that Gaudet "performed work exclusively under the direction and control of *Exxon* and was subject to *Exxon's* dismissal." (A 20a; emphasis in original).

The same court in its earlier opinion in *Ruiz* v. *Shell Oil Co.*, *supra*, listed nine separate criteria that were relevant to the borrowed servant issue, many of which would clearly militate against Gaudet being treated as a borrowed servant in the instant case.[12] Other criteria favorable to Gaudet were applied in *Dugas* v. *Pelican Const. Co., Inc.*, 481 F.2d 773, 778 (5th Cir. 1973). But the important point is not which court is correct but that

[12] For example, Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer? (413 F.2d at 313). There was, and it made Gaudet an independent contractor. Did the original employer terminate his relationship with the employee? (*id.*) On the contrary, a close relationship continued. Who had the right to discharge the employee? (*id.*). Only Tidelands.

there is no agreement on this vital interpretation of a federal statute. If the court below is correct in finding that federal law controls, surely employees are entitled to an authoritative interpretation of the controlling federal statute by this Court, particularly where the practical effect of the lower court's ruling is to cut off employees' rights to trial by jury in cases alleging negligence and resulting serous injury.

3. The Granting of Summary Judgment Under the Lands Act on a Disputed Record Such as This One Is Both Erroneous and Precedentially Dangerous.

Whether the issue of borrowed servant status be termed one of law or fact, it necessarily rests on underlying facts. Put another way, no matter which criteria or factors are adopted, they must be related to a particular factual context; they cannot be blindly applied without regard to the situation that actually existed between the regular employer, the employee, and the alleged borrowing company.

With that in mind, we respectfully submit that it should be a matter of grave concern when federal courts begin taking cases from juries under circumstances such as existed here. It is axiomatic, of course, that summary judgment is warranted only when no genuine issue as to any material fact exists.[13] Yet in this case, the record

[13] Fed. R. Civ. P. 56. This Court has pointed out that Rule 56 should not be allowed to permit "[t]rial by affidavit" as a substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Moreover, the burden is on the party seeking summary judgment to establish that no material issue of fact is in dispute, and all matters must be construed most favorably to the party opposing the motion. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). The danger of too-liberal use of summary judgment has often been pointed out by this and other courts. *E.g.*, *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 500

before the trial court contained the following facts, among others:

(a) A contract between Exxon and Tidelands, Gaudet's regular employer, provided that Gaudet's work was to be under the control of Tidelands and that Tidelands was to be an *independent contractor* as to all such work performed (CA 134-135);[14]

(b) Exxon conceded in answers and admissions that Gaudet was employed by Tidelands and that Exxon exercised no supervision or control over him (CA 5, 30, 35, 37);

(c) Exxon further conceded that on the date of the accident, Exxon had no employee on the offshore tower where the accident occured (CA 31);

(d) Tideland's insurer paid LHWCA compensation benefits to Gaudet as an employee of Tidelands (CA 133); Tidelands filed an accident report with the Department of Labor as Gaudet's employer (CA 140); Exxon filed no such report as required by LHWCA;

(1969); *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257 (1948); *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting—Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967).

[14] The Fifth Circuit suggests that the unequivocal language of the Exxon-Tidelands contract is somehow compromised by a later provision under Tidelands' insurance coverage. But that provision related only to possible instances where an *employee* might attempt to make a claim against some one as a borrowed servant. It did not concede that a borrowed servant relationship could in fact exist, and it certainly had no relevance to the situation here, where *Exxon* is asserting borrowed servant status as a defense (see n. 3, *supra*).

The Circuit Court also presumed that Gaudet was a borrowed servant because of the long period during which he worked on Exxon's platforms. It failed to realize that he undoubtedly was aware of the Exxon/Tidelands contract and therefore assumed during this entire period that he was *not* a borrowed servant but rather an independent contractor, as the contract specifically provided.

(e) Gaudet swore that he had to report regularly about his work to Tidelands, he submitted time records each day to Tidelands, and Tidelands furnished some of his tools (CA 134, 136-138; A 3a);

(f) Gaudet swore that he performed some of his work without any supervision from any one, that he followed safety regulations prescribed by Tidelands, and that he regularly received certain instructions from Tidelands (CA 136-138); and

(g) Gaudet depended entirely upon Tidelands for promotions, and he could be fired only by Tidelands (*id.*).

We cite these facts not to demonstrate that the ruling below was in error, which was clearly the case since there were genuine issues of fact in dispute that were relevant even as to the "principal" criteria cited by Fifth Circuit. We recognize that this Court does not sit simply to correct error. Our point is that if, in an effort to handle burgeoning dockets, federal courts are allowed to take cases from juries where facts are as completely in dispute as they were in this case, then problems of constitutional dimension arise and should warrant summary reversal by this Court.

CONCLUSION

We respectfully urge that for each of the above reasons, the Court should grant certiorari and either reverse summarily the judgment below, or reverse said judgment after argument and remand the case for a trial by jury.

Respectfully submitted,

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Appendices

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

Civil Action No. 74-784

RUSSELL JAMES GAUDET

versus

EXXON CORPORATION

RULING

Plaintiff, an employee of Tidelands Marine Services, Inc. (Tidelands), was injured aboard an immovable drilling rig operated by Exxon Corporation (Exxon) in the Gulf of Mexico. He has sued Exxon for damages, claiming negligence by Exxon as the cause of his injuries. Jurisdiction of this court is invoked because of diversity of citizenship of the parties. Exxon has filed a motion for summary judgment asserting that plaintiff was its "borrowed employee" and therefore, his exclusive remedy lies under the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. 905.

At the outset we note that the "borrowed servant" doctrine is well recognized in this jurisdiction, and the criteria is to be utilized in determining the applicability of the doctrine are the same in Louisiana as in federal law. *Ruiz* v. *Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *Champagne* v. *Penrod Drilling Co.*, 341 F.Supp. 1282

(W.D. La. 1971). A number of cases have reviewed the criteria for determination of borrowed servant status. While no rigid rules have been formulated, the primary criteria are, first, whose work was being performed and, second, who had control over the work activities of the employee. *Ruiz* v. *Shell Oil Co., supra; Champagne* v. *Penrod Drilling Co., supra.* If the facts of this case meet those criteria, plaintiff was a borrowed employee of Exxon, entitled to the same rights against Exxon as any employee, and subject to the limitations imposed.

The rig on which the injury occurred was located some 16 miles west of the mouth of the Mississippi River and about 29 miles south of Grand Isle, Louisiana. Thus, it was located on the Outer Continental Shelf as defined in 43 U.S.C. 1331-1343. That same Act specifically makes the provisions of the Longshoremen's and Harbor Workers Act applicable to injuries sustained by employees engaged in the production of natural resources from the sea bed of the Outer Continental Shelf, 43 U.S.C. 1333 (a) (c). The Longshoremen's and Harbor Workers Act is the exclusive remedy of employees covered by that Act, 33 U.S.C. 905.

The essential facts are not in dispute. Tidelands contracted to provide the services of its employee, plaintiff, to Exxon for the purpose of training Exxon's personnel. All of the work being performed was Exxon's work, and was connected with drilling for oil, all conducted by Exxon. Tidelands had no interest in the operation, other than supplying its employee. As established by the deposition of plaintiff and by affidavits of Exxon's field supervisors, plaintiff took all of his directions from Exxon foremen. There were no Tidelands supervisors on the rig. From time to time, at the directions of Exxon's foremen, plaintiff performed duties of other job classifications, such as general maintenance and moving of equipment.

Plaintiff asserts in his affidavit that he had to report to Tidelands' supervisor in Grand Isle on a regular basis, and from time to time received specific instructions from Tidelands. No doubt this was true, since Tidelands was the primary employer and certainly had some interest in receiving reports from plaintiff. These facts do not counter the fact, established by plaintiff's own deposition, that the day to day work activity was under Exxon's control.

In addition, plaintiff had been working under this arrangement for a number of years, and in his deposition indicated that he had acquiesced in the arrangement. All the essential equipment was provided by Exxon, although plaintiff or Tidelands furnished some of the hand tools. Plaintiff's transportation to and from the rig was provided by Exxon, as were his food and lodging on the rig.

We are satisfied that the facts as shown by the pleadings, affidavits and deposition of plaintiff establish that plaintiff was a borrowed employee of Exxon. There are no issues of material fact in dispute. As a borrowed employee, plaintiff's exclusive remedy is that provided by the Longshoremen's and Harbor Workers Compensation Act. The defendant's motion for summary judgment is granted, and plaintiff's claim against Exxon is dismissed.

THUS DONE AND SIGNED in Chambers, at Alexandria, Louisiana, this 12th day of June, 1975.

/s/ Nauman S. Scott
United States District Judge

APPENDIX B

Civil Action No. 75-1814

Section B

RUVEN ST. PIERRE

versus

EXXON CORPORATION, *et al.*

MINUTE ENTRY

December 12, 1975

HEEBE, J.

Defendant Exxon moves for summary judgment dismissing it as a defendant. Plaintiff was an employee of Bourne Welding Service. Bourne had been hired by Exxon to provide welders to work for Exxon on its offshore fixed drilling platforms. Plaintiff was injured while working on one of Exxon's platforms on the Outer Continental Shelf as defined in 43 U.S.C. §§ 1331-1343.

The Longshoremen's and Harbor Workers' Compensation Act is made applicable to such activities by 43 U.S.C. § 1333(a)(c). The LHWCA is the exclusive remedy of employees covered by that Act against their employers. 33 U.S.C. § 905. Exxon argues that it was the plaintiff's "employer" on the basis of the "borrowed servant" doctrine.

These facts are not in dispute. Plaintiff was one of several employees that Bourne furnished to Exxon. At the time of his injury, plaintiff was working on an Exxon gang and was under the supervision of an Exxon pusher, as he had been for three months prior to the accident. For seventeen years plaintiff had only worked offshore for Exxon while employed by Bourne. There was no Bourne supervisor on the platform at the time of

the accident nor had there been one during the preceding three months. Plaintiff acquiesced in this arrangement without complaint. Exxon had the power to discharge plaintiff from working for it though Exxon could not terminate plaintiff's employment with Bourne. Exxon paid Bourne which in turn paid plaintiff. Exxon arranged for plaintiff's housing, food and transportation through other contractors. The work plaintiff did was for the benefit of Exxon and not Bourne. Accordingly, under the standards outlined in Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969), and Champagne v. Penrod Drilling Co., 314 F.Supp. 1282 (W.D.La. 1971), *aff'd* 459 F.2d 1042 (5th Cir. 1972), *cert. den.* 409 U.S. 1113, we hold that plaintiff was a "borrowed servant" of Exxon.

Touchet v. Travelers Indemnity Co., 221 F.Supp. 376 (W.D.La. 1963) and *Champagne, supra* hold that a borrowed servant is entitled to the same rights against Exxon as any of its other employees and subject to the same limitations.

Plaintiff argues that he should not be limited to a compensation claim against Exxon because of Exxon's contract with Bourne. In relevant part, this contract provides that:

> "It is understood and agreed that all work by Contractor shall meet with the approval of Humble's [now Exxon] representatives, but that the detailed manner and method of doing the work shall be under the control of Contractor, Humble being interested only in the result obtained and that Contractor is an independent Contractor as to all work performed hereunder."

Bourne also agreed to carry the following insurance:

> "Endorsement that a claim made against Humble and/or its underwriters by an employee of assured-Employer hereunder based on the 'doctrine of borrowed servant' shall, for purposes of this insurance,

be treated as a claim arising under this policy against the assured-Employer and Humble shall receive the benefit of this insurance."

Plaintiff cites the decision of Judge R. Blake West in Ray W. Henning v. Continental Oil Co., Civil Action No. 73-2539, Eastern District of Louisiana, July 11, 1975, for the proposition that Exxon is not entitled to the exclusive remedy defense under the LHWCA because of the contract language. *Henning* is distinguishable. It was decided on the basis of Louisiana's workmen's compensation act, not under the LHWCA. There is no indication that the second provision quoted *supra* was involved in *Henning*. We feel that provision is important because it contemplates Exxon being liable under the LHWCA on the basis of the "borrowed servant" doctrine. This more specific provision of the contract must override any implication in the first provision that Exxon cannot be liable under the "borrowed servant" doctrine.

Plaintiff argues that this gives Exxon the best of both worlds because Exxon is indemnified from liability under the LHWCA and it is not liable for negligence under the exclusive remedy provision. While this is true, we see no reason that Exxon should not be entitled to this. Plaintiff for all practical purposes has been the employee of Exxon for the last seventeen years. Plaintiff's exclusive remedy under the LHWCA against his employer is compensation so there is no reason he should be allowed to recover anything more from Exxon. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of Exxon Corporation for summary judgment dismissing it from this suit, be, and the same is hereby, GRANTED.

/s/ Frederick J. R. Heebe

Michael X. St. Martin
Gene S. Palmisano

Civil Action No. 75-1814

Section B

RUVEN J. ST. PIERRE

versus

EXXON CORPORATION, ET AL.

MINUTE ENTRY

May 12, 1976

HEEBE, JR.

This cause came on for hearing on a previous day on the motion of defendants, Benny P. Toups, Joe W. Moore and Richard N. Boss, for summary judgment.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendants, Benny P. Toups, Joe W. Moore and Richard N. Boss, for summary judgment be, and the same is hereby, GRANTED.

REASONS

Plaintiff brought suit against Exxon Corporation, among others, for alleged injury sustained while an employee of Bourne's Welding Service, Inc. and while working on a structure owned or controlled by Exxon Corporation and situated in the Gulf of Mexico. On December 10, 1975, this Court granted the motion of Exxon Corporation for summary judgment. This Court, at that time, determined that plaintiff was the "borrowed em-

ployee" of Exxon at the time of the accident and, therefore, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 905(a), compensation was the exclusive liability of Exxon to plaintiff as his employer.

Subsequently, on December 31, 1975, plaintiff filed an amended complaint naming Benny P. Toups, Joe W. Moore and Richard N. Boss, all employees of Exxon Corporation, as party defendants. The Court feels that, in order to be consistent with its prior decision, it must grant the motion of these defendants for summary judgment. Section 933(i) of the Act also prohibits a plaintiff from suing persons employed by the same employer as the plaintiff. Since that would be the effect of permitting plaintiff to go forward with his suit against these defendants, their motion for summary judgment has been granted.

MICHAEL X. ST. MARTIN
GENE S. PALMISANO

/s/ Frederick J. R. Heebe

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 75-3101, 76-1196 and 76-2668

RUSSEL JAMES GAUDET,
Plaintiff-Appellant,

v.

EXXON CORPORATION,
Defendant-Appellee.

RUVEN ST. PIERRE,
Plaintiff-Appellant,

v.

EXXON CORPORATION, *et al.*,
Defendants-Appellees.

RUVEN J. ST. PIERRE,
Plaintiff-Appellant,

v.

EXXON CORPORATION, BENNIE P. TOUPS,
RICHARD N. BOSS and JOE W. MOORE,
Defendants-Appellees.

Nov. 4, 1977

Appeals from the United States District Court
for the Eastern District of Louisiana

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

JAMES LAWRENCE KING, District Judge:

Appellants in these cases seek review of orders in their respective trials granting summary judgment in favor of all defendants. The single issue presented is whether the trial courts erred in holding as a matter of law that appellants were barred by the Longshoremen's and Harbor Workers' Compensation Act [1] (LHWCA) from maintaining suits for negligence against defendants. For reasons to follow, we affirm in all cases.

Appellant Gaudet (No. 75-3101) originally worked for Tidelands Marine Service, Inc. ("Tidelands"). In 1963, under an arrangement with Tidelands, Gaudet began general maintenance and repair [2] at Exxon's West Delta Block 73, a complex of eight fixed platform oil drilling rigs located on the Outer Continental Shelf offshore the

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* District Judge of the Southern District of Florida, sitting by designation.

[1] 33 U.S.C. § 901 *et seq.*

[2] According to the record, Gaudet was regularly employed at Exxon's West Delta Block 73 for some 14 or 15 years. Initially, he worked as a roustabout in the drilling operations, then later, as a pumper's helper. When the United States Coast & Geodetic Survey Safety Regulations came in effect, he was one of the most experienced men in the field, and because of that he was put to training others (both Tideland's employees and Exxon's regular employees) to perform the work required to comply with those regulations. After a time, when Exxon's regular employees had been trained Exxon "phased out" the other Tideland's employees, keeping only appellant and placing him in a four-man group to work under Exxon's field foremen and field superintendent.

State of Louisiana.[3] There Gaudet, while engaged in regular duty under the supervision of Exxon's field foreman, sustained injury to his knee when struck by a barrel falling from a rack. Gaudet brought suit against Exxon for negligence.

The District Court granted summary judgment for Exxon, finding that the essential facts were not in dispute and those facts established that Gaudet could not sue Exxon for negligence because he had become Exxon's "borrowed employee," whose exclusive remedy lay under the LHWCA.[4] Gaudet appealed and challenged the appropriateness of the summary judgment.

Appellant St. Pierre (Nos. 76-1196 and 76-2668) originally worked for Bourne Welding Services, Inc.

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[3] The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*, the jurisdictional base for these suits, specifically makes applicable the provisions of the Longshoremen's and Harbor Workers' Compensation Act for compensation for injuries sustained by employees engaged in the work of producing oil or gas or other natural resources from subsoil or seabed of the outer continental shelf. § 1333(c). The Louisiana negligence law, pursuant to which plaintiffs sought recovery, is incorporated into federal law by this Act. § 1333(a)(1). *Aymond* v. *Texaco*, 554 F.2d 206 (5th Cir. 1977).

[4] 33 U.S.C. § 905 provides: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee." *See Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

33 U.S.C. § 933(i) furthermore, precludes suits against fellow employees under the LHWCA:

> "The right to compensation or benefits under this Chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed by the negligence or wrong of any other person or persons in the same employ. . . .

See Hughes v. *Chitty*, 283 F.Supp. 734 (E.D. La. 1968), *aff'd* 415 F.2d 1150 (5th Cir. 1969). The constitutionality of the exclusivity provisions was upheld in *Keller* v. *Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971). *See also Nations* v. *Morris*, 311 F.Supp. 771 (E.D.La. 1971), *aff'd* 483 F.2d 577 (5th Cir. 1973).

("Bourne"). Some 17 years ago Bourne furnished him to Exxon at whose direction he worked on the offshore production facility known as Grand Isle Block 16. He was under the supervision of Field Maintenance Foreman ("gang pusher") Bennie P. Toups when he stood on a 55-gallon chemical drum to weld a channel iron for the installation of an electric generator. He was injured when the drum exploded from hot slag from his weld. The District Court rendered summary judgment against St. Pierre in his suit against Exxon for negligence. Subsequently he filed against Exxon and fellow supervisory employees Toups, Boss, and Moore, but he was again defeated at the summary judgment stage. In each case the court held that the suit was barred by the LHWCA because of St. Pierre's status as a "borrowed employee." St. Pierre appealed.

THE BORROWED EMPLOYEE DOCTRINE AND THE LHWCA

In *Standard Oil* v. *Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909) the Supreme Court recognized the concept of the borrowed employee or borrowed servant doctrine thusly:

> One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation. *Id.* at 220, 29 S.Ct. at 253, 53 L.Ed. at 483.

The court further explained:

> It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may

> then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became *pro hac vice* the servants of him to whom they are furnished. . . . [In this] case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. *Id.* at 221, 29 S.Ct. at 254, 53 L.Ed. at 483.

As the court clearly held, under the borrowed employee doctrine, an employer will be liable through *respondeat superior* for negligence of an employee he has "borrowed," that is, one who does his work under his supervision and control.

According to the court, to determine whether an employee is the employee of his original employer or the borrowed employee of another

> we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the [servant] in the performance of [his] work. *Id.* at 221-222, 29 S.Ct. at 254, 53 L.Ed. at 483-84.

In *Ruiz* v. *Shell Oil Co.*, 413 F.2d 310, 312-13 (5th Cir. 1969), this court mentioned nine factors to be evaluated in determining whether an employee is to be considered a borrowed employee of another:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

Ruiz failed to detail how the test should be applied, which factors are to be given primary weight, and which, if any factors, are controlling. Apparently they are to be weighed as appropriate in each particular case, because the court went on to state that "no one of these factors, or any combination of them, is decisive, and no fixed test is used to determine the existence of a borrowed-servant relationship." *Id.*[5]

Appellants argue that *Dugas* v. *Pelican Const. Co., Inc.*, 481 F.2d 773 (5th Cir. 1973) indicates that of all the *Ruiz* factors, the agreement between borrowing and lending employer should be given controlling weight. In *Dugas* this court remarked, "[E]ssential to [the borrowed employee] relationship is some type of agreement, written or verbal, formal or informal, between the general employer and the temporary employer evidencing an intention to create that relationship." *Id.* at 778. Taken out of context, this idea does not precisely square with *Ruiz*. But central to the holding in *Dugas* was the lack

[5] The *Ruiz* factors were followed in *Champagne* v. *Penrod Drilling Co.*, 341 F.Supp. 1282, 1284-85 (W.D.La. 1971), *aff'd* 459 F.2d 1042 (5th Cir. 1972), where the court agreed that "no fixed test is used to determine the relationship." *Id.*

of "even minimal suggestion, criticism, recommendation, or advice" to the employee. 481 F.2d at 778. Therefore we are inclined to view *Dugas*' emphasis on the agreement between employers as "broad language . . . more expansive than . . . necessary to decide the case, correctly decided on its facts." *Davis* v. *Estelle*, 529 F.2d 437, 442 (5th Cir. 1976). Notably, this court in *Dugas* finally reached the same conclusion we had reached in *Ruiz*: "[N]o one factor or specific combination of factors is determinative of the borrowed employee relationship." 481 F.2d at 778.

To decide which *Ruiz* factors, if any, should be determinative in this case, the use of the borrowed employee doctrine to extend the coverage of the LHWCA and thus to bar common law damage actions must be examined. Used in this context, the doctrine bears little resemblance to that doctrine evolved to hold the proper employer responsible for the torts of his employee, the concept of *respondeat superior*. *See Standard Oil* v. *Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909); *Benoit* v. *Hunt Tool Co.*, 219 La. 380, 53 So.2d 137 (1950).[6] Within the context of *respondeat superior* the focus on control in the traditional test of borrowed employee status is proper, because only if the employee acted under the orders of his employer should injuries to third parties be traced to the original negligence of the employer. In the instant case, however, instead of being a device to impute liability, the borrowed employee doctrine is a means to escape it through the exclusive remedy provisions of the LHWCA.

The LHWCA was designed to provide an injured employee with certain and absolute benefits in lieu of possi-

[6] Although the *Standard Oil* Court envisioned that the doctrine would apply to "all . . . legal consequences [of employment]," this was merely *dicta* as *Standard Oil* was a *respondent superior* case.

ble common law benefits obtainable only in tort actions against his employer. *See Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020, 87 S.Ct. 731, 17 L.Ed.2d 557. Although the coverage of the LHWCA is not contractual and does not depend upon the consent of the parties, nonetheless when an employee begins work for an employer under the coverage of the LHWCA, he is presumed to have consented to the Act's trade-off of possibly large common law damages for smaller but certain LHWCA benefits. And by the very act of continuing in employment, he may be assumed to agree that, considering the likelihood of injury and the likely severity of injury within the working conditions he experiences, the benefits offered by the LHWCA in the event of injury are acceptable.

Under the LHWCA an employee retains the right to sue third parties.[7] *Crawford* v. *Pope & Talbot, Inc.*, 206 F.2d 784 (3d Cir. 1953). It would be unfair to expect an employee to waive this right against third parties, because generally he has had no opportunity to evaluate the risks that third parties present him. Thus if an employee momentarily leaves the work site of his original employer and begins work temporarily for another employer, it might be unfair to deprive him of common law remedies before he can amply assess the risk in the new location. Likewise, if he changes locations but brings the working conditions of his original employment including the original risks, to the new location, he is still aware principally of the risks inherent in the first work situation and cannot be presumed to have consented to risks beyond them. But if an employee *continues* working in a new location, exposed to risks resulting from the direction and control of the new employer, there must come a time when policy dictates the LHWCA should apply, and the new employer, and new co-employees, should no

[7] A limitation on this right is the prohibition of suits against co-employees. *See* n. 4, *supra*.

longer be considered third parties but a true employer and true co-employees, liable only under the LHWCA.

Thus in the instant case the question is whether the circumstances of appellants' employment are such that Exxon should be considered an employer and not a third party under the LHWCA. As this is a matter of line-drawing guided by policy, the facts of each case must control the result. Considering this as best viewed as a question of the extent of coverage under the LHWCA, federal law applies. The traditional borrowed employee test, with its emphasis on control revealing its heritage in *respondeat superior*, has answered the question. In many cases, as in the instant one, the traditional test yields conclusions valid in the LHWCA context, but that doctrine should not be applied blindly, especially in circumstances in which it did not evolve.

Of the constellation of *Ruiz* factors that may decide the issue then, certain factors are most pertinent when the borrowed employee doctrine is used as a defense to common law liability in the LHWCA context. The principal focus within the *Ruiz* test in this case should therefore be: (1) was the second employer itself responsible for the working conditions experienced by the employee, and the risks inherent therein and, (2) was the employment with the new employer of such duration that the employee could be reasonably presumed to have evaluated the risks of the work situation and acquiesced thereto? The first test, of course, parallels the *Ruiz* tests of which employer furnishes tools and place of performance and whether the first employer has terminated his relationship with the employee. The second parallels the tests of employment over a considerable length of time and agreement or acquiescence by the employee. Other factors in *Ruiz* may of course be helpful to the court in evaluating whether the LHWCA should apply in a given case, but no others should be considered essential.

PROPRIETY OF SUMMARY JUDGMENT

In each case below, the trial court considered various documentary evidence submitted by the parties and concluded that, with regard to those issues found to be determinative of borrowed employee status, no material issues of fact remained. The court then granted summary judgment for Exxon. Appellants urge that the granting of summary judgment on this point was inappropriate because whether one is a borrowed employee is itself an issue of disputed fact which should not be determined at summary judgment.

This court as well as the Seventh and Ninth Circuits have held that "the issue of whether a relationship of borrowed servant existed is a matter of law." *Ruiz* v. *Shell Oil Co.*, 413 F.2d 310, 314 (5th Cir. 1969); *Gudgel* v. *Southern Shippers, Inc.*, 387 F.2d 723 (7th Cir. 1967); *McCollum* v. *Smith*, 339 F.2d 348 (9th Cir. 1964).[8] We agree that the issue is best considered an issue of law. A dispute over whether one is a borrowed servant (or in a broader context, whether the LHWCA should apply) could still exist although all the facts were stipulated, for it concerns not only the facts themselves but the implications to be drawn from the facts. In *Kiff* v. *Travelers Ins. Co.*, 402 F.2d 129, 131 (5th Cir. 1968), we held that when

> the determinative factual ingredients of [the] employment status are not disputed[,] [t]he only question presented, then, is whether these basic facts require the imposition of liability . . . This question of law should have been decided by the court, not the jury.

[8] *But see Guidry* v. *Texaco, Inc.*, 430 F.2d 781 (5th Cir. 1970), affirming the trial court on the borrowed employee issue because the trial court's findings were not "clearly erroneous," a standard of review appropriate for matters of fact. *Id.* at 784.

The trial court found that sufficient "determinative factual ingredients," *i.e. Ruiz* factors, were undisputed to warrant a conclusion that appellants' common law actions for negligence were barred against Exxon and other defendants. Appellants cannot generate a factual dispute merely by contesting the conclusion reached by the court, rather they must show that genuine disputes exist over enough determinative factual ingredients to make a difference in this result.

Appellants argue that a disputed material issue of fact exists concerning the agreement between the original employers and Exxon, and that resolution of this issue is essential in light of *Dugas*. The agreements between the appellants original employers, Tideland and Bourne ("Contractor") and Exxon are identical and read as follows:

> It is understood and agreed that all work so done by Contractor shall meet with the approval of [Exxon's] representatives, but that the detailed manner and method of doing the work shall be under the control of Contractors, [Exxon] being interested only in the result obtained and that Contractor is an independent Contractor as to all work performed hereunder.

This seems to indicate that the parties intended appellants to be independent contractors and not borrowed employees. But Exxon cites a further provision which it contends indicates that the parties contemplated a borrowed employee relationship might exist.

> Claims made against persons or firms by an employee of the Named Insured based on the 'doctrine of borrowed servant' shall, for the purpose of this insurance, be treated as a claim arising under this policy against the Named Insured, and such persons or firms shall have benefit of this insurance to that extent.

A trial court cannot appropriately resolve disputed issues of material fact in granting summary judgment. However, we have already held that the *Dugas* language indicating that the agreement between borrowing and lending employers is *essential* to the resolution of the borrowed employee issue, cannot be taken at face value. Thus the trial court could have concluded that the test for borrowed employee status was met *regardless* of the ultimate resolution of the factual matter of the agreement between the employers. We will not insist upon the expense and delay of a trial if the overall issue can be resolved through a preponderance of other factual matters *not* in dispute.

In *Gaudet*, plaintiff's deposition establishes that he performed work exclusively under the direction and control of *Exxon*, and was subject to *Exxon's* dismissal. Significantly, it appears undisputed that Gaudet had worked on the *Exxon* platform, with full opportunity to evaluate the risks for over 12 years. During all of that time he had acquiesced in this arrangement. Exxon furnished all of the major tools of his employment and was the employer who established Gaudet's working conditions, including the risks inherent thereto. In *St. Pierre* it likewise is undisputed that St. Pierre worked under the direction and control of *Exxon* while performing *Exxon's* work. He had worked under this arrangement exposed to risks created by Exxon, for some 17 years.

On this undisputed evidence, the trial courts correctly concluded that appellants' sole remedy against Exxon was under the LHWCA. Whether using the traditional borrowed employee test found in *Standard Oil*, the somewhat expanded test of *Ruiz*, or our suggested focus within that test, sufficient basic factual ingredients are undisputed to warrant the entry of summary judgment. Thus the judgments below are

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3101
D.C. Docket No. CA-74-784

RUSSELL JAMES GAUDET,
Plaintiff-Appellant,

versus

EXXON CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

Before MORGAN and RONEY, Circuit Judges, and KING,* District Judge.

JUDGMENT

This case came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellant pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 4, 1977

ISSUED AS MANDATE: DECEMBER 22, 1977

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* District Judge of the Southern District of Florida, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 76-1196
76-2668

D.C. Docket No. CA75-1814 "B"

RUVEN ST. PIERRE,
Plaintiff-Appellant,

v.

EXXON CORPORATION, *et al.*,
Defendants-Appellees.

RUVEN ST. PIERRE,
Plaintiff-Appellant,

v.

EXXON CORPORATION, BENNIE P. TOUPS,
RICHARD N. BOSS and JOE W. MOORE,
Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

Before MORGAN and RONEY, Circuit Judges, and KING,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

---

* District Judge of the Southern District of Florida, sitting by designation.

Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed:

It is further ordered that appellants pay to appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 4, 1977

ISSUED AS MANDATE: DECEMBER 27, 1977

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3101

RUSSEL JAMES GAUDET,
Plaintiff-Appellant,

versus

EXXON CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING

(December 14, 1977)

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Lewis R. Morgan
United States Circuit Judge

---

* District Judge of the Southern District of Florida, sitting by designation.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 76-1196 and 76-2668

RUSSEL JAMES GAUDET,
Plaintiff-Appellant,

v.

EXXON CORPORATION,
Defendant-Appellee.

RUVEN ST. PIERRE,
Plaintiff-Appellant,

v.

EXXON CORPORATION, *et al.*,
Defendants-Appellees.

RUVEN J. ST. PIERRE,
Plaintiff-Appellant,

v.

EXXON CORPORATION, BENNIE P. TOUPS,
RICHARD N. BOSS and JOE W. MOORE,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING EN BANC

(December 19, 1977)

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Lewis R. Morgan
United States Circuit Judge

---

* District Judge of the Southern District of Florida, sitting by designation.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

I. The relevant portions of the OUTER CONTINENTAL SHELF LANDS ACT, as amended, are as follows:

Title 43 U.S.C. § 1331:

Laws and regulations governing lands—Constitution and United States laws;

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.

Title 43 U.S.C. § 1331:

Laws of adjacent states;

(a)(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . . All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. . . . [Emphasis added]

Title 43 U.S.C. § 1333:

Jurisdiction of the United States district courts

(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

Title 43 U.S.C. § 1333:

Applicability of Longshoremen's and Harbor Workers' Compensation Act; definitions

(c) *With respect to disability* or death *of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.* For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon. [Emphasis added].

II. The relevant portions of the *Longshoremen's & Harbor Workers' Compensation Act*, as amended, are as follows:

Title 33 U.S.C. § 904:

Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

Title 33 U.S.C. § 905:

Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death,

except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action of law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Title 33 U.S.C. § 930:

Reports

(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

Title 33 U.S.C. § 933:

Compensation for injuries where third persons are liable:

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors

or legal representatives if he is killed, by the negligence or wrong of any person or persons in the same employ: *Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer* [Emphasis added]

Supreme Court, U. S.
FILED
APR 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1284

RUSSEL JAMES GAUDET,
Petitioner,

versus

EXXON CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1284

RUSSEL JAMES GAUDET,
Petitioner,

versus

EXXON CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, EXXON CORPORATION IN OPPOSITION

OPINIONS BELOW

The ruling of the District Court granting respondent's motion for summary judgment, reprinted as Appendix A of Petition, is unreported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's App. C) is reported at 562 F. 2d 351.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The pertinent provisions of the Outer Continental Shelf Lands Act, as amended (43 U.S.C. §§1331(a), (b), and (c)), and the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U.S.C. §§904, 905(a), 930(a) and (i)), are set forth in the Petition at Appendix F.

QUESTIONS PRESENTED

1. Whether a plaintiff's remedies against a third party for injuries received on an offshore platform are properly found in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) once a Court has determined, pursuant to the Outer Continental Shelf Lands Act (Lands Act), under State law, that he is the borrowed servant of that third party.

2. Whether the status of borrowed servant is properly determined by the Court when there is no genuine issue as to any material fact.

3. Whether the factors involved in a determination of borrowed servant status are to be weighed as appropriate in each particular case rather than using some "fixed test."

4. Whether respondent's motion for summary judgment was properly granted where all necessary undisputed facts existed in the record for the Court to make a determination of the borrowed servant status of the plaintiff.

REASONS FOR DENYING CERTIORARI

1. Petitioner's status was determined under the Lands Act applying State law. Once status was determined, the Lands Act itself directed the use of the LHWCA which provides petitioner's remedies.

2. There is no conflict among the circuits as to the determination of the status of borrowed servant under the Lands Act.

3. The granting of summary judgment was proper because there were no genuine issues as to any material fact.

STATEMENT OF THE CASE

Respondent is the owner of a complex of eight fixed oil production platforms, known as West Delta Block 73, located on the Outer Continental Shelf in the Gulf of Mexico, seaward of the State of Louisiana.

Petitioner, an employee of Tidelands Marine Service, Inc., had been regularly employed at this complex for some fourteen (14) years when he sustained the injury on which the instant lawsuit is based.

Petitioner has filled many positions during his years on the Exxon platforms but at the time of his in-

jury he was a member of an Exxon Instrumentation (I & E) Group. This is a group of men who regularly perform special inspection and maintenance work on the numerous safety devices and controls installed on the platforms. As mineral lessee of the Federal Government and as platform owner, Exxon has the responsibility for these safety measures pursuant to regulations imposed by the United States Geological Survey.

Petitioner was the only Tidelands Marine Service, Inc. employee involved in this type of work at the West Delta Block 73 complex. All other members of petitioner's group were regular Exxon employees. The group worked under Exxon's field foreman and field superintendent.

When not involved in these primary duties, the members of the I & E Group performed other tasks as directed by Exxon's field foreman. Among these other jobs were general maintenance and repair work, crane operation, clean-up work, and even work in other job categories such as operation of the production facilities. On the day of his accident, petitioner had been sent to another platform by the Exxon field foreman to perform one of these supplemental jobs. He was injured when a barrel fell from a rack and struck his knee.

Petitioner filed a claim against Tidelands Marine Service, Inc. under the LHWCA, 33 U.S.C. §904, and received the benefits provided therein. He also filed suit against respondent, Exxon Corporation, in the United States District Court for the Western District of Louisiana. By Amending and Supplemental Com-

plaint, petitioner alleged that the jurisdiction of the Federal Court was found in the Lands Act, 43 U.S.C. §1333.

REASONS FOR DENYING CERTIORARI

1. Petitioner's Status Was Determined Under The Lands Act Applying State Law. Once Status Was Determined, The Lands Act Itself Directed The Use Of The LHWCA Which Provides Petitioner's Remedies

It is clear from a careful reading of the District Court's ruling and the decision of the Fifth Circuit that there has been no error in the result reached by the Lower Courts. Perhaps not every step in the Court's reasoning process was committed to writing, but this decision should not be reviewed by this Honorable Court, since a reading of the two Statutes (Lands Act and LHWCA) gives ample authority for the Courts' rulings.

It should be noted at the outset that the sole specification of error presented to the Fifth Circuit was that the lower Court held that there was no genuine issue as to a material fact and therefore erred in granting summary judgment. Petitioner has seized upon certain language in the opinion of the Fifth Circuit and used that language to raise in this Court, for the first time, the issue of whether his status as a borrowed servant was decided under the Lands Act or the LHWCA. This issue was not briefed below and it is inappropriate to now urge it. *State v. Taylor*, 353 U.S. 553 (1957); *Lawn v. United States*, 355 U.S. 339 (1958);

Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967). It is submitted that the reason this issue was not raised below was that petitioner's status had been determined under the proper law by the lower Court.

However, assuming *arguendo* that this issue had been properly preserved, there is nothing to indicate error. Petitioner claims that his status as a "borrowed employee" of Exxon was determined by the Fifth Circuit using Federal standards pursuant to the LHWCA rather than State standards as commanded by the Lands Act.

What is ignored, of course, is that the Fifth Circuit did not determine petitioner's status. This was determined in the lower Court. The Fifth Circuit upheld this determination. Thus, any complaint as to the method of determination should have been raised in the Appeals Court. But, petitioner is not complaining that the lower Court erred and that the Fifth Circuit compounded this error. What he is complaining of is that the language of the Fifth Circuit opinion, conceivably, may be open to more than one interpretation. However, no matter how the language is interpreted, the fact remains that the only action the Appeals Court took was to uphold a perfectly correct decision. By complaining of the Fifth Circuit's method of "determining" his status, rather than having complained below of the lower Court's method, petitioner is simply saying that the Appeals Court was right for the wrong reason. This Court should not now address itself to an issue not raised below simply because the Appeals Court's language was unsatisfactory to petitioner.

The decisions below clearly show that it was not until petitioner's status had been determined that the LHWCA was looked to to determine his remedies. That this is proper is admitted by petitioner in his brief (p. 7).

Because petitioner was injured on an offshore platform, he looked to the Lands Act for redress. Vis-a-vis his general employer, Tidelands Marine Service, Inc., the Act indicated that he should look to the LHWCA for his remedies. This he did and received the benefits outlined in that Act. As to any other party, the Lands Act directed him to the law of the adjacent State, in this case Louisiana.

During the litigation, respondent raised as a defense the question of petitioner's status. The concept of "borrowed servant" is well recognized in Louisiana. *Benoit v. Hunt Tool Co.*, 219 La. 380, 53 So. 2d 137 (1950); *B & G Crane Service v. Thomas W. Hooley & Sons*, 227 La. 677, 80 So. 2d 369 (1955) and the cases cited therein.

Contrary to petitioner's statement, Louisiana law and Federal law use the same criteria for determining borrowed servant status. *Champagne v. Penrod Drilling Company*, 341 F. Supp. 1282 (W. D. La., 1971), aff'd. 459 F. 2d 1042 (5th Cir., 1972). The trial court recognized that the criteria are the same. (Petitioner's App. 1A). Using these criteria and finding no essential facts in dispute (Petitioner's App. 2A) the Court determined that petitioner was a "borrowed employee" of Exxon.

Once this determination was made pursuant to State law, petitioner's remedies were the same as those of any other employee of Exxon injured on an offshore platform. The Lands Act specifically provides that those remedies are found in the LHWCA and consist of compensation payments. Petitioner does not deny that he received such payments. Whether these benefits were paid by Exxon, Tidelands, or an insurer, is of no moment.

Petitioner cites a number of cases supposedly holding that borrowed servant status is a question of fact in Louisiana. Two of these cases, *D'Antoni v. Sara Mayo Hospital*, 144 So. 2d 643 (La. App., 1962), and *Grant v. Touro Infirmary*, 254 La. 204 (1969), simply do not address that question. A third, *Danks v. Maher*, 177 So. 2d 412 (La. App., 1965), erroneously cites *D'Antoni* as authority. The other three cases cited are distinguishable in that they each involved disputed facts.

In the instant case, the facts were not in dispute (Petitioner's App. 2A-3A). In such a situation, it is appropriate under Louisiana law that the judge determine status. *Owens v. AAA Contracting Company*, 219 So. 2d 226 (La. App., 1969); *Kiff v. Travelers Insurance Company*, 402 F. 2d 129 (5th Cir., 1968).

Petitioner states that it is "immediately imperative that the duties and responsibilities of those who operate offshore platforms toward those who work on them be properly established." It is submitted that the duties of those operating offshore platforms to those who work on them have been properly established by

the Congress by enacting into law the Lands Act and the LHWCA. There is no evidence that any further laws are needed because of exploratory operations along the Eastern Seaboard. Mere speculation that present laws may sometime in the future prove inadequate is no reason for the involvement of this Court to review this case.

2. There Is No Conflict Among The Circuits As To The Determination Of The Status Of Borrowed Servant Under The Lands Act

Petitioner states that the Fifth Circuit "recognized that one of its own earlier rulings, *Guidry v. Texaco, Inc.*, 430 F. 2d 781, 784 (5th Cir., 1970), had held to the contrary," (Petitioner's brief p. 12), i.e., that the existence of a borrowed servant relationship is a matter of fact. This was not the reason for the Fifth Circuit's mention of *Guidry*. Rather, the Court cited *Guidry* simply to show that summary judgment is not proper when there is a dispute as to material facts. *Guidry* was cited because it was in contrast to the instant case not because it was in conflict with it.

The *Guidry* case was decided by the judge, sitting without a jury, on the basis of a disputed record. He found that plaintiff was not a borrowed servant of defendant. The Fifth Circuit, very reluctantly, affirmed:

> "The findings recited above were made on disputed evidence given by live witnesses in the presence of the district judge. After reviewing the evidence, we are not able to say that these findings were clearly erroneous." *Id.* at 784.

In attempting to find a conflict among circuits, petitioner has obviously misread the decisions cited by the Fifth Circuit, *Gudgel v. Southern Shippers, Inc.*, 387 F. 2d 723 (7th Cir., 1967) and *McCollum v. Smith*, 339 F. 2d 348 (9th Cir., 1964).

Petitioner states, "In *Gudgel*, the Seventh Circuit in a case involving neither the Lands Act nor LHWCA recognized the borrowed servant issue as one of fact and allowed a jury, under state law, to consider it." (Petitioner's Brief, p. 13).

The question to be decided in *Gudgel* was whether one defendant was the borrowed servant of a second defendant so as to make that defendant liable to plaintiff under the doctrine of *respondeat superior*. Although the question went to the jury, when the jury found that such a relationship existed, the trial court entered a judgment notwithstanding the verdict. In affirming, the Seventh Circuit stated:

> "The evidence in support of Southern Shippers' position is overwhelming." *Id.* at p. 727.
>
> and
>
> "Considering all of the evidence we do not believe the jury could *reasonably* conclude that Freischlag was undertaking the business of Southern Shippers at the time of the collision." *Id.* at p. 726. (Emphasis supplied).

Thus, instead of supporting petitioner's position, *Gudgel* reinforces the Fifth Circuit's position, i.e. when the facts are not in dispute, it is proper that the

question of borrowed servant status be decided by the Court.

Petitioner states that, in *McCollum*, the Ninth Circuit held that whether there was a change of masters was one of fact *when the facts are debatable*. (Emphasis supplied). This is a fair statement although it is more *dicta* than holding.

However, as in the instant case, the facts were not debatable and the Ninth Circuit affirmed the trial court's granting of a directed verdict. After discussing the concept of borrowed servant, the Court stated:

> "A careful consideration of the entire record in the light of these propositions makes manifest the conclusion that Choy was the servant of Concrete, so far as the outcome of this case is concerned.' 339 F. 2d 348, 352.

The Court also stated:

> "In conclusion, we are fully satisfied that the trial judge *correctly appraised the evidence* and that his ruling was right." *Id.* at p. 352. (Emphasis supplied).

Thus, in the instant case, the Fifth Circuit upheld the grant of summary judgment on the question of borrowed servant status when the facts were undisputed. In support thereof, it cited a Seventh Circuit decision upholding the entry of a judgment NOV and a Ninth Circuit decision affirming a directed verdict on the same issue. Rather than being in conflict, as petitioner alleges, all three decisions are in perfect harmony.

Even were there a conflict among circuits, petitioner would find scant comfort in that fact. Each of the cases involved, *Gudgel*, *McCollum*, and *Gaudet* interpreted State law; the first two because they were diversity actions and this case because it was filed under the Lands Act. To find differences among State laws is not unusual. It is stretching a point to state that such differences in State laws establish the conflict between or among the circuits that has been an historical reason for granting certiorari. As this Court has stated:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

Also, there is no question of which criteria to apply in deciding the status of borrowed servant. Almost seventy years ago this Court held that:

> ". . . we must inquire whose is the work being performed, — a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221-222 (1909).

Through the years, these criteria have been honed and refined, expounded on and made clearer until today, in the Fifth Circuit, nine factors are evaluated. *Ruiz v. Shell Oil Co.*, 413 F. 2d 310 (5th Cir., 1969). This does not mean that a numerical weight is to be given

each factor and that when some magic score is reached a worker becomes a borrowed servant. Rather, all factors are to be weighed as may be appropriate in a given case. No "fixed test" is used. *Champagne v. Penrod Drilling Co.*, 341 F. Supp. 1282 (W. D. La., 1971), aff'd 459 F. 2d 1042 (5th Cir., 1972).

The Fifth Circuit clearly held in *Ruiz*, supra, that:

> "Nor is there any evidence which could be inferred to create a borrowed-servant relationship between National and Ruiz. All the facts being overwhelmingly to the contrary, the court correctly refused to submit this issue to the jury. Boeing Co. v. Shipman, 5 Cir., 1969, 411 F. 2d 365. This Circuit, the Seventh and Ninth Circuits have, in the absence of substantial evidence to the contrary, held the issue of whether a relationship of borrowed servant existed is a matter of law. Kiff v. Travelers Insurance Company, 5 Cir., 1968, 402 F. 2d 129; Gudgel v. Southern Shippers, Inc., 7 Cir., 1967, 387 F. 2d 723; McCollum v. Smith, 9 Cir., 1964, 339 F. 2d 348."

The point is that where the necessary facts are not in dispute, as they are not here, the Court rules on this issue as a matter of law.

3. The Granting Of Summary Judgment Was Proper Because There Were No Genuine Issues As To Any Material Fact

Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment where the moving par-

ty is entitled to judgment as a matter of law, where it is quite clear what the truth of the case is, and where no genuine issue remains for trial. The Rule does not cut litigants off from their right to a trial by jury if it is determined from the facts that are before the Court that there are no genuine material facts in dispute. *Poller v. Columbia Broadcasting System*, 368 U.S. 467 (1962). See also *Cates v. Beauregard Electric Co-operative, Inc.*, 328 So. 2d 367, La. Sup. Ct. (1976).

Subsection "E" of Rule 56 should be specifically noted in that it states with particularity the following:

> "..... When a Motion for Summary Judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The key issue of whether or not a motion for summary judgment should be granted is based on the facts before the Court and whether or not those facts are in dispute. It was determined by two tribunals, the District Court (Petitioner's App. A) and the Fifth Circuit Court of Appeals (Petitioner's App. C), that the issues before them were not in dispute and that as a matter of law, petitioner was the "borrowed servant" of Exxon and that his sole remedy was under the LHWCA.

CONCLUSIONS

We respectfully urge that for each of the above reasons the Court should not grant Certiorari and should affirm the Judgment of the Lower Court.

Respectfully submitted,

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